No. 87-526

In The
Supreme Court of the United States
October Term, 1987

BOBBY FELDER,

Petitioner,

v.

DUANE CASEY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Does it violate federal policy for a state to apply its notice of claim statute in state court actions brought under 42 U.S.C. § 1983?

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STATEMENT OF THE CASE

Respondents accept Petitioner's statement of the case, as supplemented by the following information concerning the decision by the Wisconsin Supreme Court. In this brief, references to the Appendix to the Petition for Certiorari, which contains the decision of the Wisconsin Supreme Court, are indicated by "A-," and references to the Joint Appendix are indicated by "JA-."

In its decision, the Wisconsin Supreme Court carefully analyzed and obviously relied heavily upon the decisions of two other state appellate courts, Indiana and New York, wherein a state notice of claim statute was held applicable to a federal cause of action brought in state court. In discussing *Clark v. Indiana Dep't of Public Welfare*, 478 N.E.2d 699 (Ind. Ct. App. 1985), *cert. denied*, 476 U.S. —, 106 S.Ct. 2893 (1986), the Wisconsin Supreme Court accepted the *Clark* court's position that such a claim statute

> ". . . is a procedural precedent which must be fulfilled before filing suit in state court. . . . Because it is a procedural precondition to sue, it overrides the procedural framework of sec. 1983 when the litigant chooses a state court forum." 478 N.E.2d at 702 (citations omitted).

Felder v. Casey, 139 Wis. 2d 614, 625, 408 N.W.2d 19, 24 (1987); A-10.

Similarly, the Wisconsin Supreme Court quoted the New York decision, *Mills v. County of Monroe*, 58 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, *cert. denied*, 464 U.S. 1018 (1983), wherein the New York Court of Appeals stated:

> "Although Congress established no timeliness or notice requirements to apply to section 1981 actions brought in Federal court, these courts have been in-

> structed that, when interstices or voids occur in the Federal law, they should borrow the applicable State rule of law so long as it is not 'inconsistent with the Constitution and laws of the United States' . . . . This court . . . does not find that the State's notice requirements are antithetical to the policy underlying the civil rights laws." 59 N.Y.2d at 309-10, 451 N.E.2d at 457 (quoting 42 U.S.C. sec. 1988; case citations omitted). Also, *see, Robertson v. Wegmann*, 436 U.S. 584, 588 (1978).

Felder, 139 Wis. 2d at 625-26, 408 N.W.2d at 24; A-10.

The Wisconsin Supreme Court also discussed its prior decisions on the beneficial purposes served by Wis. Stat. § 893.80 (1985-86), referring to *Patterman v. City of Whitewater*, 32 Wis. 2d 350, 145 N.W.2d 705 (1966) and *Harte v. City of Eagle River*, 45 Wis. 2d 513, 173 N.W.2d 683 (1970). The court stated:

> It has been said that the primary purpose of a notice of claim statute is to give the municipality the opportunity to attempt to compromise the claim and effect settlement before the parties are forced to proceed with a lengthy or costly lawsuit.

Felder, 139 Wis. 2d at 624, 408 N.W.2d at 23-24; A-9.

The Wisconsin Supreme Court went on to point out that:

> The remedial and deterrent purposes underlying sec. 1983 actions are not frustrated simply because a state court litigant must abide by state court procedures. The notice of claim statute does not operate to limit the amount that a plaintiff might recover for a violation of his or her civil rights. Nor does the notice requirement operate to preclude a plaintiff's possibility for recovery.

Id. 139 Wis. 2d at 628, 408 N.W.2d at 25 (footnote omitted); A-12.

Finally, it should be noted that, having concluded that Wis. Stat. § 893.80 (1985-86) is a condition precedent to the bringing of a federal civil rights action in a Wisconsin state court, the Wisconsin Supreme Court then concentrated its attention upon whether Petitioner had complied with the notice of injury portion of the statute, as set forth in Wis. Stat. § 893.80(1)(a) (1985-86), and concluded that Petitioner had not.

Accordingly, the court was not called upon to decide whether Petitioner had complied with the second portion of that statute, i.e., Wis. Stat. § 893.80(1)(b) (1985-86), with respect to the filing of an "itemized statement of the relief sought." The record in this case is completely devoid of any such filing.

SUMMARY OF ARGUMENT

The Wisconsin notice of claim statute is a simple procedural requirement that does not place an unreasonable burden upon persons who sue local governments. The statute is followed routinely by persons who bring actions in Wisconsin state and federal courts against local governments to preserve their state law claims and to initiate the settlement procedure.

The notice of claim statute has been liberally construed by the Wisconsin Supreme Court to preserve *bona fide* claims. Wis. Stat. § 893.80(1)(a) (1985-86), which requires that a notice of circumstances of claim be filed within 120 days, does not bar a person who has not filed a timely notice from maintaining an action in state court if the local government had received actual notice of the claim and was not prejudiced by lack of earlier written notice.

Legitimate public interests are served by requiring compliance with the notice of claim statute in all actions brought in Wisconsin state courts. The State of Wisconsin has enacted the notice of claim statute and other laws to allow municipalities to promptly investigate claims, to take remedial action where appropriate, to provide some measure of financial stability, and to protect officers and employees of local governments from judgments and litigation expenses.

Under the principles of federalism, state courts hearing federal actions may apply state procedural rules that are not inconsistent with federal law, including remedial statutes such as 42 U.S.C. § 1983. Application of the Wisconsin notice of claim statute to a federal action brought in state court does not frustrate federal policy. Where a plaintiff complies with the procedural requirements of the notice of claim statute, Wisconsin state courts will then entertain the entire federal action, including all of its substantive attributes.

The notice of claim statute neither impedes immediate access to the federal courts, nor unreasonably burdens the prosecution of federal claims in state court because it provides a litigant with reasonable time to sue. Wis. Stat. § 893.80 (1985-86) is not a statute of limitations, and does not grant governmental immunity from liability. The Wisconsin Supreme Court has already decided that the immunity aspects of Wis. Stat. § 893.80 (1985-86) applicable to state tort litigation does not apply to federal civil rights actions heard in Wisconsin state courts.

Any analysis of 42 U.S.C. § 1988 is inapplicable to the question presented because no choice of law decision is made by the court. A state court may apply state procedural laws to all actions before it if, as in this case, the

application of the particular law does not frustrate federal policies.

ARGUMENT

I. THE WISCONSIN NOTICE OF CLAIM STATUTE DOES NOT PLACE AN UNREASONABLE BURDEN UPON PERSONS WHO CHOOSE TO PURSUE THEIR 42 U.S.C. § 1983 CLAIMS IN STATE COURT.

The Wisconsin notice of claim statute as construed and applied by the Wisconsin Supreme Court does not unreasonably burden claimants who choose to vindicate their federally protected rights in state court. It does, however, further an entirely different interest; that is, the interest of the state that legal disputes between its citizens and its political subdivisions be resolved, if possible, short of litigation. Before addressing the legitimate public interests served by Wis. Stat. § 893.80 (1985-86), and the reasons why that statute is not inconsistent with federal law, Respondents believe it is important that this Court understand both what the statute requires of claimants and how the Wisconsin Supreme Court has interpreted the statute. It is only against this background that this Court can properly analyze the various legal arguments concerning application of the Wisconsin notice of claim statute to federal civil rights cases brought in Wisconsin state courts.

Wis. Stat. § 893.80 (1985-86) provides that a suit may not be brought against a municipality or its employees unless two conditions are met. The first condition is stated in Wis. Stat. § 893.80(1)(a) (1985-86), which requires that within 120 days after the occurrence giving rise to a claim, a "written notice of the circumstances of the

claim signed by the party, agent or attorney" be served upon the municipality, and if the suit is to be brought against an employee, upon the employee. The provision does not specify what should be stated in the notice of the circumstances of the claim, but does require that it be signed by the person submitting it. The subsection, however, also contains a reprieve for claimants. Failure to give a notice of circumstances within 120 days does not bar an action on the claim if the municipality ultimately receives actual notice of the claim—there is no requirement that the employee receives actual notice of the claim—and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the municipality, or if an employee is being sued, to the employee. This provision, as discussed below, has been liberally construed by the Wisconsin courts.

In *Nielsen v. Town of Silver Cliff*, 112 Wis. 2d 574, 334 N.W.2d 242 (1983), the Wisconsin Supreme Court discussed the "notice of circumstances of claim" provision, stating:

> A claim is automatically preserved if written notice is given within 120 days after the event causing the injury. The receipt of timely written notice creates a conclusive presumption of no prejudice. However, noncompliance with the written notice requirement does not necessarily bar a claim. The statute provides that actual notice is sufficient to maintain a claim if the plaintiff shows that the governmental unit was not prejudiced. This method of preserving the claim does not need a time limit because a subjective showing of no prejudice assures that the statute's purpose has been satisfied regardless of when actual notice is received. This conclusion accords with the plain language of the statute which establishes no time limit for actual notice.

Id. 112 Wis. 2d at 580-81, 334 N.W.2d at 245.

Accordingly, the Wisconsin Supreme Court has construed Wis. Stat. § 893.80 (1985-86) in such a manner as to permit cases to go to trial even when the notice of circumstances of claim was either not given or given late. In *Nielsen*, the court held that the failure to give a written notice of circumstances of claim to the town within 120 days did not bar the action because the town received actual notice in the form of a claim in a letter from the claimant's attorney eight months after the incident, and the evidence was sufficient to sustain a finding of no prejudice to the town by the lack of timely written notice. In *Weiss v. City of Milwaukee*, 79 Wis. 2d 213, 228, 255 N.W.2d 496, 501 (1977), the court held that actual notice in the form of a claim for damages submitted in compliance with Wis. Stat. § 893.80(1)(b) (1985-86) given two years after the incident constituted compliance where the city was not prejudiced by the lack of earlier written notice.

The overriding principle the Wisconsin Supreme Court has adhered to with respect to consideration of such claims is that a " 'construction which preserves a *bona fide* claim so that it may be passed upon by a competent tribunal is to be preferred to a construction which cuts it off without a trial.' " *Sambs v. Nowak*, 47 Wis. 2d 158, 166, 177 N.W.2d 144, 148 (1970), *quoting with approval, Moyer v. City of Oshkosh*, 151 Wis. 586, 593-94, 139 N.W. 378, 381 (1913). The court's policy has been "to preserve a *bona fide* claim where there has been substantial compliance with a statute requiring notice." *Novak v. City of Delavan*, 31 Wis. 2d 200, 211, 143 N.W.2d 6, 12 (1966) (citations omitted).

The second provision is stated in Wis. Stat. § 893.80 (1)(b) (1985-86), which provides that a claim containing the address of the claimant and an itemized statement of the relief sought be presented to the city clerk. No action can be brought or maintained until a claim is filed and disallowed by the municipality either by service of a notice of disallowance upon the claimant or by the failure of the municipality to disallow the claim within 120 days after presentation. If the claimant receives a notice of disallowance from the municipality by registered or certified mail, an action must be brought within six months from the date of the service of the notice. The notice, however, is required to contain a statement informing the claimant of the six-month limitation.

In considering the Wis. Stat. § 893.80(1)(b) claim provision, the Wisconsin Supreme Court has construed the statute to require only a claim "definite enough to fulfill the purpose of the claim statute. . . ." *Gutter v. Seamandel*, 103 Wis. 2d 1, 10-11, 308 N.W.2d 403, 408 (1981). Applying this standard, the Wisconsin Supreme Court held that a demand for a lump sum in damages is a sufficiently itemized statement of relief sought, *Figgs v. City of Milwaukee*, 121 Wis. 2d 44, 55, 357 N.W.2d 548, 554 (1984), and that a wife's claim for loss of companionship arising from her husband's injury need not be made separately from the husband's claim. *Nielsen*, 112 Wis. 2d at 582-83, 334 N.W.2d at 246. The requirement that suit be commenced within six months of disallowance does not create an unreasonable burden. Inasmuch as the claimant may choose when to file his claim, he may also freely decide when he will start his court action, so long as he does so within the outer boundary of the statute of limitations.

Binder v. City of Madison, 72 Wis. 2d 613, 622, 241 N.W.2d 613, 617 (1976).

Finally, the Wisconsin Supreme Court has required defendants to affirmatively plead noncompliance with the state claim statute in their answer. *See, e.g., Robe v. Outagamie County*, 72 Wis. 2d 492, 498, 241 N.W.2d 428, 432 (1976); *Majerus v. Milwaukee County*, 39 Wis. 2d 311, 317, 159 N.W.2d 86, 88-89 (1968). Of course, where, as in this case, there has been no attempt at compliance with the claim statute, the court is left with no choice but to dismiss the case.

In light of the Wisconsin Supreme Court's interpretation of the claim statute, it is clear that Petitioner's characterization of the statute as a "trap for the unwary claimant," and "a lawyer's nightmare" is unwarranted.

The original action was filed by Petitioner in Milwaukee County Circuit Court on April 2, 1982, almost nine months after his arrest. Had Petitioner sent the following letter to the city clerk sometime between July 4, 1981 and early November 1981, he would have complied with both subsections of the claim statute:

4060 North 15 Street
Milwaukee, Wisconsin

City Clerk
City Hall
Milwaukee, WI 53202

Dear City Clerk:

On July 4, 1981, Milwaukee police officers beat me up and arrested me for nothing. I want $100,000 [or any other specific sum, at Petitioner's option] for my injuries.

Very truly yours,
Bobby Felder (signature)

This simple letter would have initiated the City of Milwaukee's claim review procedure. An investigation of the claim would have been conducted, followed by an assistant city attorney's evaluation of the claim's merits for settlement purposes. Negotiations might then have taken place, and Petitioner's claim might, in fact, have been resolved without the necessity of filing the lawsuit. On the other hand, had the City of Milwaukee failed to settle the claim within the time allotted by the statute, Petitioner's decision to commence this action on April 2, 1982, would not have been affected.

This is not a case of ignorance by Petitioner of the notice of claim requirements. The defense of failure to comply with Wis. Stat. § 893.80 (1985-86) was raised in the defendant's answer to the April 2, 1982 complaint (and, in fact, also in the two subsequent answers). *Felder*, 139 Wis. 2d at 618, 408 N.W.2d at 21; A-4; JA-35. Accordingly, had Petitioner acknowledged his procedural error at that time rather than choosing to ignore it, he could have still complied easily with the notice of claim statute. Had he done so, he would also have been permitted to pursue the various state tort claims set forth in his complaint, claims which were subsequently dismissed at trial based precisely upon Petitioner's noncompliance with Wis. Stat. § 893.80 (1985-86), or he could have filed his action in federal court.[1]

Finally, Petitioner would have had to show only that the City was not prejudiced by the late notice, a simple

[1]Had he chosen to file his action in federal court, he nevertheless would have had to file a claim to maintain his pendent state tort claims. *Orthmann v. Apple River Campground*, 757 F.2d 909, 911 (7th Cir. 1985).

task under the facts of this case. Wis. Stat. § 893.80(1)(a) (1985-86) permits the action to proceed if the City had actual notice and was not prejudiced by the delay or lack of written notice. Had Petitioner filed a claim after he was notified by the defendants' answer of his noncompliance, the City would have received "actual notice of claim," albeit many months after his arrest.

Wis. Stat. § 893.80 (1985-86) is routinely complied with by Wisconsin claimants in cases ranging from a simple "trip and fall" on a defective sidewalk and those involving municipal vehicular accidents, to complex litigation involving design of the City's sewer system. In many civil rights cases, including those subsequently brought in federal court, potential plaintiffs also comply with the provisions of Wis. Stat. § 893.80 (1985-86), to effect a settlement and, if unsuccessful, to preserve their pendent state claims. Irrespective of the complexity of a particular case, however, compliance with the notice of claim statute remains a simple task. Indeed, the vast majority of claims made are presented by claimants unrepresented by counsel through letters as simple as the one postulated in this brief.

II. THE WISCONSIN NOTICE OF CLAIM STATUTE FURTHERS LEGITIMATE PUBLIC INTERESTS.

The State of Wisconsin has decided that it serves a valid public purpose to create a means whereby legal disputes between its subdivisions and its citizens can be resolved short of litigation. The claim statute is part of a larger statutory scheme enacted by the State of Wisconsin to address not only the issue of how a claim is to be pur-

sued against a municipality but also how it is to be paid, who is to pay it and who is to bear the legal expense should the claim fail to be settled and litigation ensues.

Under state law political subdivisions of the state pay any judgment entered against its officers or employees arising out of acts committed within the scope of their employment. Wis. Stat. § 895.46 (1985-86). This statute further provides that in the event of such litigation, the political subdivision must either provide an attorney to represent the officer or employee, or, if it fails to do so, to pay the officer or employee's attorney's fees. *Beane v. City of Sturgeon Bay*, 112 Wis. 2d 609, 615, 334 N.W.2d 235, 238 (1983).

In effect, Wis. Stat. § 895.46 (1985-86) requires a municipality to pay a civil rights judgment awarded against a municipal officer or employee and to bear the cost of defense, irrespective of the outcome, even if the municipality itself did not violate the civil rights law. *Bell v. City of Milwaukee*, 746 F.2d 1205, 1271 (7th Cir. 1984). Wis. Stat. § 895.46 (1985-86) represents the judgment of the state that when its citizens are injured or deprived of a state or federal right by public officials or employees, the citizen should receive compensation, and at the same time, the public official or employee should not bear the cost of the judgment or the defense. *Horace Mann Ins. Co. v. Waukesha Bd. of Educ.*, 88 Wis. 2d 385, 389-90, 276 N.W.2d 761, 764-65 (1979). These decisions made by the State of Wisconsin expose its subdivisions to large liability and defense costs. The notice of claim statute, Wis. Stat. § 893.80 (1985-86), furthers the public interest by assisting municipalities in controlling those costs.

The "notice of circumstances of claim" provision of Wis. Stat. § 893.80 (1985-86), stated in subsection (1)(a), also furthers a public interest greater than the control of costs, which is the prevention of further harm. The sooner the municipality receives notice of a claim, whether it be a dangerous pothole or an arrest policy in the police department, the sooner the municipality can fully investigate the circumstances and, if appropriate, act to insure that the dangerous pothole is filled or the policy in violation of the federal civil rights law is corrected.

The claim portion of the statute, Wis. Stat. § 893.80 (1)(b) (1985-86), furthers the public interest by allowing claimants to present their claims directly to the governing body, in this case the Common Council of the City of Milwaukee.

> "Statutory . . . provisions requiring presentation of claims or demands to the governing body of the municipal corporation before an action is instituted are in furtherance of a public policy to prevent needless litigation and to save unnecessary expenses and costs by affording an opportunity amicably to adjust all claims against municipal corporations before suit is brought."

Patterman, 32 Wis. 2d at 357, 145 N.W.2d at 708-09 (citation and footnote omitted).

This Court, since its decision of *Parratt v. Taylor*, 451 U.S. 527 (1981), has repeatedly discussed the value of meaningful *post hoc* procedures (albeit in a procedural due process context), recognizing that such procedures might even, in appropriate cases, satisfy due process requirements and thereby preclude action under

42 U.S.C. § 1983. Although the issue of adequate post-deprivation remedies is not before the Court in this substantive due process case, simple procedural mechanisms such as Wis. Stat. § 893.80 (1985-86) can hardly be characterized as repugnant to the purposes of a federal law specifically passed to provide both compensation for injury and deterrence from future violations. Indeed, it is difficult to contemplate how a state law which allows a claimant who so chooses to meet with a committee composed of members of the governing body and present his grievance for consideration can be said to undermine those federal purposes.

Wis. Stat. § 893.80 (1985-86) also furthers the public interest in maintaining the financial stability of its local governmental units by requiring claimants to specifically state the dollar amount of their claim. It permits municipalities to more accurately measure their future liabilities and expenses, which in turn allows them to more accurately budget and set the tax rate, reserve current income to meet future liabilities, and, where possible, obtain insurance coverage.

Finally, in those instances where a claim has not been resolved pursuant to Wis. Stat. § 893.80 (1985-86), litigants can expect an earlier hearing of their cases by the Wisconsin state courts. The judicial economy achieved because of Wis. Stat. § 893.80 (1985-86) makes it more likely that those cases will not be delayed by other cases ripe for settlement pursuant to Wis. Stat. § 893.80 (1985-86).

III. THE WISCONSIN NOTICE OF CLAIM STATUTE IS NOT INCONSISTENT WITH FEDERAL LAW.

When the state law does not conflict with the Constitution or a federal law, this Court has applied the state law. *Minneapolis & St. Louis R.R. v. Bombolis*, 241 U.S. 211, 222-23 (1916). In that case, this Court upheld a Minnesota law that provided that a case may be decided by five-sixths of a jury if the case has been under submission to a jury for a period of 12 hours without a unanimous verdict. *Id.* The Court held that because the Seventh Amendment, which requires a unanimous verdict in federal court, did not apply to the states, there is no conflict with the state rule and accordingly the state court is free to apply the state rule to an action brought under the Federal Employer's Liability Act. *Id.* This Court stated the principle that a lawfully enacted law of a state is not to be struck down on the basis of a void in federal law:

> [L]awful rights of the citizen, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the state or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority, state or nation, creating them.

Id. at 221.

The Wisconsin notice of claim statute does not conflict with federal law. The effect of the state law on the federal remedy is the same as if the Congress of the United States enacted a uniform governmental claim statute that would require claimants seeking money damages

from a governmental entity under a federally created cause of action to file a claim against the governmental entity prior to filing suit. The law would not be considered in any way inconsistent with the federal civil rights law because the law would have nothing to do with the particular type of claim being pursued, other than that the claim is being brought against the governmental entity. The public interests advanced in Section II of the Argument, *supra*, would aptly serve as the justification for the statute, which would become simply one of many federal procedural laws that litigants are required to follow to pursue their various claims in federal court.

In this case, the State of Wisconsin, and many other states, have passed just such a law. Petitioner maintains that the application of such a law precludes the state court from applying the entire federal cause of action, is inconsistent with this Court's decisions governing exhaustion of administrative remedies, statute of limitations, and immunity, is inconsistent with the purposes of 42 U.S.C. § 1983 and the principles of federalism, and finally that state courts are not compelled to apply state claim statutes by 42 U.S.C. § 1988 or the Tenth Amendment.

A. Wisconsin Courts Hear the Entire Federal Action.

Petitioner's argument that the Wisconsin courts do not consider the entire federal cause of action disregards the significant difference between a state notice of claim statute and other state laws that this Court has previously considered. The law applies only if the claimant chooses to file in state court. Compliance with the law is entirely in the hands of the claimant. This is unlike the state laws governing immunity, damages or burden of

proof, that, if applied in the context of a civil rights action, have an inextricable effect on the outcome and, once the choice of law decision is made, apply in both state and federal court. In contrast, notice of claim statutes, once complied with, have no effect on the application of the federal remedy by the state court. Although failure to comply with a notice of claim statute will result in dismissal of the federal action in state court, this result is no different than what would occur if other procedural rules, be they in state or federal court, are not complied with.[2]

Notice of claim statutes, therefore, are unlike the state laws passed upon by this Court in *Garrett v. Moore-McCormick Co.*, 317 U.S. 239 (1942); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949); and *Dice v. Akron C. & Y. R.R.*, 342 U.S. 359 (1952), relied upon by Petitioner. In those cases, the state rule encroached upon a substantive federal right. The federal civil rights law and Wisconsin's notice of claim statute serve non-conflicting and, in some respects, identical public interests. A civil rights claimant who complies with the simple procedural provisions of Wis. Stat. § 893.80 (1985-86) may proceed in Wisconsin state courts with his entire federal cause of action, with all of its substantive attributes.

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[2]Dismissal of a plaintiff's claim can be based upon the following procedural statutes: Wis. Stat. § 803.06 (1985-86) (failure to serve named defendant); Wis. Stat. § 803.10 (1985-86) (failure to make substitution of parties); Wis. Stat. § 805.03 (1985-86) (failure to prosecute or to comply with statutes governing procedure in civil actions or to obey any order of the court); Fed. R. Civ. P. Rule 4(j) (failure to serve named defendant); Fed. R. Civ. P. Rule 16(f) (failure to obey scheduling or pretrial order); Fed. R. Civ. P. Rule 25(a)(1) (failure to make substitution of parties); Fed. R. Civ. P. Rule 37 (failure to comply with order of court); Fed. R. Civ. P. Rule 41(b) (failure to prosecute or to comply with procedural rules or any order of the court).

Petitioner's reliance on *El Paso and N.E. Ry. v. Gutierrez*, 215 U.S. 87 (1909), is also misplaced. Although this Court struck down the application of a territorial notice of claim statute in a state proceeding brought under the Federal Employer's Liability Act, this Court noted that it would have upheld the application of a claim statute had it been passed by a state as opposed to a territory because the authority of the federal government over the territories was plenary. *Id.* at 92-93, 96-97.

B. Wisconsin Courts Hear the Entire 42 U.S.C. § 1983 Action.

This same analysis distinguishes the cases relied upon by Petitioner brought pursuant to § 1983. In *Martinez v. California*, 444 U.S. 277, 284-85 (1980), this Court noted that the California immunity law would not apply to a federal cause of action brought in state court because immunity from a federal cause of action raises a question of federal law. *See also Hampton v. City of Chicago*, 484 F.2d 602, 607 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974). Accordingly, application of a state immunity rule, if broader than the federal immunity rule, would encroach upon a substantive federal right. This choice of law decision in favor of the federal law is the same irrespective of whether the case is in state or federal court, since neither state nor federal courts may apply a state rule that is contrary to the federal rule and encroaches upon a substantive federal right.

The holding in *Maine v. Thiboutot*, 448 U.S. 1, 10-11 (1980) that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, applied in state court merely

confirms that the express provisions of the civil rights law shall be applied by the state court when it hears a civil rights action. The fear expressed by this Court that a different rule would create a financial incentive for claimants to only file such cases in federal court is clearly not present in this case. Here, the financial incentives to the claimant are the same, irrespective of whether claimant files in state or federal court. Attorney's fees are available, and the Wisconsin Supreme Court has held that the limitation upon damages which ordinarily applies to a suit against governmental subdivisions do not apply in federal civil rights cases. *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 298, 340 N.W.2d 704, 708-09 (1983).[3]

The preparation and mailing of a simple document—far simpler than a complaint—can hardly be viewed as a disincentive on the same level as an inability to obtain attorney's fees. This is particularly true when one considers that if a civil rights claimant in federal court also pleads a pendent state claim such as negligence, malicious prosecution, loss of consortium, or intentional infliction of emotional distress, the claimant is still required to file a claim irrespective of the fact that the civil rights case is in federal court.

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[3] Wis. Stat. § 893.80(3) (1985-86) provides that: "The amount recoverable by any person for any damages, injuries or death in any action founded on tort . . . shall not exceed $50,000. . . . No punitive damages may be allowed or recoverable in any such action under this subsection."

C. Application of Wisconsin's Notice of Claim Statute is not Inconsistent with this Court's Decisions Governing Exhaustion of Administrative Remedies, Statute of Limitations and Immunity.

1. Exhaustion of administrative remedies.

Petitioner argues that the application by the state court of the state claim statute in a 42 U.S.C. § 1983 action is inconsistent with this Court's decision in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), in which this Court held that exhaustion of state administrative remedies is not required as a prerequisite to bringing an action pursuant to § 1983 in federal court. In arriving at its decision, this Court considered the legislative history of § 1983 and the legislative history of the Civil Rights Institutionalized Persons Act, 42 U.S.C. § 1997e, which created a narrow exception to the general no exhaustion rule. *Id.* at 507-09. Paramount in this Court's analysis was the conclusion that the legislative history of § 1983 indicated the 1871 Congress intended to protect the rights of citizens of the United States by giving them immediate access to the *federal courts*. *Id.* at 504. To require persons to exhaust their administrative remedies prior to obtaining access to the federal court would therefore frustrate this purpose. *Id.* at 509-10.

The Wisconsin claim statute does not prevent a person from immediate access to federal court. If, however, a person chooses to pursue his or her claim in the state court because of certain procedural advantages, then he or she is required to comply with the state notice of claim statute. There is nothing in the legislative history of § 1983 to indicate that it was the intent of the Congress

of 1871 to give its citizens immediate access to state courts and thereby declare invalid any state procedural laws serving legitimate public interests.

Even if this Court concludes that "immediate access" should be available to the state courts as well, the Wisconsin notice of claim statute does not impede access to the state courts in the same manner as a requirement that administrative remedies be exhausted. A person who chooses to litigate in state court need only file a claim and wait the requisite 120 days before filing a lawsuit. The claimant need not wait until administrative review of the claim is completed. The burdens of an exhaustion requirement, additional expense and inordinant delay, simply do not occur because of the imposition of a 120 day waiting period.

Petitioner has failed to show how the 120 day waiting period constitutes an unreasonable burden. In fact, many litigants choose to bring their civil rights cases in state court, in spite of the Wisconsin notice of claim statute, in order to obtain the advantages of a five-sixth jury verdict (Wis. Stat. § 805.09(2) (1985-86)), the opportunity to draw a jury from an urban population, and greater familiarity with state court procedures and personnel. Quite plainly, these state court advantages far outweigh any claimed procedural disadvantage which might arise by having to wait at most 120 days, particularly when few, if any, civil rights suits are brought so soon after the alleged violation.

2. Statute of limitations.

Petitioner argues that application of the state notice of claim statute effectively imposes a 120 day limitation upon § 1983 actions brought in state court and is

therefore inconsistent with this Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985). The Wisconsin notice of claim statute is not a statute of limitations. Wis. Stat. § 893.80(1)(a) (1985-86) requires a notice of the circumstances of the claim to be filed within 120 days; however, as discussed in Argument I, *supra*, the failure to do so is not fatal to the action.

Although failure to file the claim itself will bar the action, that is no different than noncompliance with the other procedural requirements. *See supra* note 2, at 17. The claim under Wis. Stat. § 893.80(1)(b) (1985-86) need only be filed in time to bring the action before the expiration of the applicable statute of limitation. *Schwetz v. Employers Ins. of Wausau*, 126 Wis. 2d 32, 34-35, 374 N.W.2d 241, 242-43 (Ct. App. 1985). The Wisconsin notice of claim statute, therefore, as it has been applied and interpreted by the courts of Wisconsin gives a party a reasonable time to sue.

3. Immunity.

Petitioner argues that Wis. Stat. § 893.80 (1985-86) is a state created immunity and therefore should not be applied in state court pursuant to this Court's decision in *Martinez*, 444 U.S. 277. Wis. Stat. § 893.80 (1985-86) is not a grant of governmental immunity.

Wis. Stat. § 895.43 (1963), the predecessor to Wis. Stat. § 893.80 (1985-86), was adopted by the Wisconsin Legislature through passage of 1963 Wis. Laws Ch. 198, in response to the Wisconsin Supreme Court's abrogation of governmental immunity from tort liability in *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962). The legislature subsequently expanded the

notice of claim statute by adopting 1977 Wis. Laws Ch. 285, so that the notice of claim procedure applies to *all* claims, as opposed to just state tort claims. However, the "immunity" aspects of Wis. Stat. § 893.80 (1985-86), insofar as that statute applies to federal civil rights causes of action have, as discussed earlier, already been eliminated by the Wisconsin Supreme Court in *Thompson*, 115 Wis. 2d 289, 340 N.W.2d 704. The court stated in *Thompson*:

> State law cannot be used where its application would frustrate federal policies. The policy behind sec. 1983 civil rights actions is one of compensation for actual injury. Insofar as the state recovery ceiling prevents realization of that policy, it must give way. We conclude that the limitation on municipal liability set forth in sec. 893.80, Stats., has no application to a damage award under 42 U.S.C. sec. 1983.

Id. 115 Wis. 2d at 304, 340 N.W.2d at 711.

The *Thompson* court recognized that the awarding of attorney fees pursuant to 42 U.S.C. § 1988 are available to a prevailing plaintiff in a § 1983 action. *Id.* 115 Wis. 2d at 309, 340 N.W.2d at 713-14. Respondents also read *Thompson* as rejecting the "no punitive damages" immunity aspect of Wis. Stat. § 893.80(4) (1985-86) in § 1983 actions. No vestages of immunity remain within Wis. Stat. § 893.80 (1985-86).

D. 42 U.S.C. § 1988 Does Not Prohibit the Wisconsin Courts From Applying the Wisconsin Notice of Claim Statute.

Petitioner argues that application of the state claim statute conflicts with the provisions of 42 U.S.C. § 1988 as construed by this Court. The Wisconsin notice of claim

statute, however, is unlike the state laws this Court has considered in its interpretation of § 1988. The state claim statute is wholly independent of the civil rights statute. There is no necessity for a court, state or federal, to make reference to the state claim statute to dispose of issues necessarily addressed in the course of the application of the federal remedy. The cases, therefore, in which this Court made choice of law decisions pursuant to the directives of § 1988 do not address the issues raised by the state notice of claim statute. The state court does not "borrow" the state notice of claim statute to determine whether or not an action is properly before it. The state court merely applies the state procedural laws unless it finds that application of a particular law would frustrate federal policies.

Respondents do not argue that the federal law is deficient in its lack of a notice of claim provision, but simply that the state court properly applied the state claims law because the provisions are not inconsistent with the remedial purposes of the civil rights law.

CONCLUSION

The Wisconsin notice of claims statute furthers legitimate public interests without unreasonably burdening a plaintiff who chooses to pursue a federal civil rights remedy in state court. For the foregoing reasons, the judgment of the Wisconsin Supreme Court should be affirmed.

Respectfully submitted,

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